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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 RIO TINTO PLC,

4 Plaintiff,

5 v.

14 CV 3042 (RMB-AJP)

6 VALE, S.A.,

7 Defendants.

8 -----x

9 New York, N.Y.

10 May 8, 2015

2:00 p.m.

11 Before:

12 HON. ANDREW J. PECK,

13 Magistrate Judge

14 APPEARANCES

15 QUINN EMANUEL URQUHART & SULLIVAN, LLP

Attorneys for RIO TINTO PLC

16 BY: KEITH H. FORST

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22 BY: VINCENT FILARDO

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1 (In open court)

2 THE COURT: Welcome back.

3 It looks like the first issue that is not just
4 informational is the Nardello report issue, starting on page 2.
5 Is there anything before that?

6 MR. LYTTLE: Your Honor, there is the issue before
7 that of the letters of request and the arbitration materials.
8 I don't know which order you want to take that up, but it
9 actually appears in two places.

10 THE COURT: The letters of request, all I see is that
11 you've --

12 MR. LYTTLE: I apologize, your Honor.

13 THE COURT: I see, as requested, defendants have
14 produced the Nardello report for me to look at.

15 Mr. Liman or one of your colleagues, why don't you
16 help me out. I have two pieces of page, four pages, engagement
17 letter for Nardello, and then I have the Clifford Chance
18 report. I don't seem to have a Nardello report itself unless
19 that is a piece --

20 MR. LIMAN: It is a piece, your Honor. We tried to
21 put a tab next to where the Nardello report begins. It is
22 behind tab 7. There is a color flag that marks the beginning.

23 THE COURT: I got it.

24 Perhaps one way to deal with this is what is the
25 evidence that plaintiffs have about the waiver, alleged waiver,

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1 because if there is a waiver, I don't need to worry about the
2 other issues?

3 MR. LYTTLE: Good afternoon, your Honor.

4 In April of 2013, we have learned from counsel for the
5 Guinean government, Mr. Scott Horton, that the general counsel
6 of Vale, Mr. Clovis Torres, invited a representative of the
7 Guinean government to review the Nardello report. At the time,
8 it was not attached to that Clifford Chance memorandum. It was
9 a stand-alone document. Mr. Torres, the general counsel,
10 initiated the meeting, hosted the meeting, and participated and
11 sat in the meeting. Mr. Horton, I had asked for an email -- he
12 is traveling, I haven't been able to get written confirmation
13 of that -- but we do believe that is what happened.

14 At the time, the government of Guinea was actively
15 investigating corruption and bribery at Simandou and was
16 actively adverse to at least VBG, which was the joint venture
17 which Vale had 51 percent share of and managed the day-to-day
18 operations of. So we believe that it is absolutely a full
19 waiver, a knowing waiver. Any selective waiver in the Second
20 Circuit is pretty much a dead letter. The facts here certainly
21 wouldn't support it, either.

22 THE COURT: Mr. Liman, is this the first you know that
23 it was Vale's general counsel, or were you told that before --

24 MR. LIMAN: Your Honor, a couple of days ago, we were
25 given the information that was just relayed to your Honor. We,

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1 too, tried to reach out to Mr. Horton this morning, and did get
2 a response back. I would note, just even from the proffer that
3 has been made to you, there are a couple of deficiencies and a
4 couple of things we think are inaccurate. In April of 2013,
5 Vale was not under investigation by the Guinean government. It
6 would have had a common interest with the Guinean government
7 with respect to potential claims against BSGR, which as you
8 know, have been made. But we're prepared to investigate this,
9 as we indicated to counsel for Rio Tinto, and to present the
10 case to your Honor with a full set of facts and issues with
11 respect to waiver. Frankly, both U.S. law and U.K. law would
12 apply here. The engagement letter -- the relationship with
13 Clifford Chance was a relationship that was run basically out
14 of the U.K. As your Honor can see, the engagement of Nardello
15 was done with the Nardello firm in the U.K., to be paid in
16 pounds with a choice of law under U.K. law to be resolved in
17 courts --

18 THE COURT: That may be in terms of the relationship
19 between Clifford Chance and Nardello. As to U.S. privilege in
20 this litigation, I'm somewhat dubious that one can
21 contractually get more protection for something by contracting
22 under U.K. law.

23 MR. LIMAN: Your Honor, that is not obviously the
24 extent of our argument. There is no evidence of any ties to
25 the United States with respect to what you just heard from

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1 counsel.

2 THE COURT: I understand that.

3 MR. LIMAN: I am prepared, your Honor, to address the
4 question with respect to whether the Nardello report is
5 privileged. We've read the cases cited by Rio Tinto. The
6 thrust of them seems to be the unexceptional proposition that
7 when you have a document that is not independently privileged,
8 you can't cloak it with privilege by having it sent to the
9 client by a lawyer. Our position, just so it is clear, is that
10 the Nardello report is independently privileged, both under the
11 Kovel doctrine for attorney-client privilege and with respect
12 to attorney work product. It is not analogous to a newspaper
13 article that you might transmit or a business document. It was
14 generated only because Nardello was retained by Clifford Chance
15 from Vale's perspective. Vale would have been content, it
16 would have been sufficient to have Clifford Chance's advice.
17 The fact that Clifford Chance, in the exercise of its
18 professional judgment, chose to hire Nardello does not make
19 that work by Clifford Chance and the report delivered to it any
20 less than privileged.

21 THE COURT: Clearly, looking at the retention in the
22 engagement letter, it clearly shows that Clifford Chance hired
23 Nardello for its investigative services in connection with its
24 legal advice to Vale. So, at a minimum, it may well be work
25 product if not privileged. So I think it makes more sense to

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1 give Vale a little bit of time to talk to its general counsel,
2 Mr. Howard, who was involved, and find out what are the facts
3 and deal with it first from the waiver.

4 The other point I would note is -- and stop me,
5 Mr. Liman, if I say anything that itself violates the
6 privilege. But in the methodology description, it seems that a
7 lot of what they did was research from public records/open
8 sources --

9 MR. LIMAN: Your Honor, at this point, I think
10 actually what they did and who directed them probably does
11 intrude into the privilege --

12 THE COURT: I guess what I'm suggesting is, to the
13 extent that the information that found its way into the
14 Nardello report is and was public record, it's probably
15 something that Rio Tinto can hire its own Nardello or do its
16 own research on.

17 MR. LIMAN: That's precisely our point. They can take
18 the depositions of the witnesses. The general counsel's name
19 is Clovis Torres, and we will consult with him and consult with
20 Rio Tinto.

21 How would you like the parties to bring this issue
22 back before you if, as I suspect, we're not able to reach
23 agreement but we might --

24 THE COURT: Suppose affidavits, letter briefs, or
25 formal motions, as you all may wish. I don't mind it being

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1 informal. I think, for the factual basis, I will need the
2 affidavit from Mr. Torres, and the Guinean counsel's
3 information, which seems to have come from Mr. Horton. Whether
4 Mr. Horton was the person involved in the alleged review or was
5 just telling what he now knows, I don't know.

6 MR. LIMAN: Fine, your Honor.

7 THE COURT: Anything further from the plaintiff on
8 this?

9 MR. LYTTLE: No, your Honor.

10 THE COURT: Okay. And I guess I will hold onto this
11 material for now.

12 Okay. Next --

13 MR. LIMAN: Your Honor, if I can maybe short-circuit
14 things a little bit and tell you how we have organized things
15 on our end. With respect to the issues about document
16 retention and document production, as well as Chinalco and BHP,
17 my colleague, Mr. Reents is going to be addressing them. With
18 respect to Chinalco, we had a conversation with plaintiff's
19 lawyers just before your Honor came on the bench, where they
20 made a proposal to us which would involve the production of
21 some of the Chinalco documents. Subject to your Honor's
22 agreement, I think what we would propose is that after the
23 conference we go in the back room to see if we can come to an
24 agreement. If we can, our hope would be to present it to your
25 Honor; if we cannot, unfortunately we need to address it with

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1 your Honor.

2 THE COURT: Let me go in the order of the letter,
3 though, or I will never keep track of all of this.

4 So the eight key custodian destruction issue, which
5 seems to tie into the issue of how much information Rio Tinto
6 is entitled to with respect to this as opposed to the questions
7 that have been asked, which I don't think I have a copy of --

8 MR. LYLE: The questions are attached as Exhibit A to
9 the joint letter. It was not included in yours, I can give you
10 a copy.

11 THE COURT: It was not included in mine.

12 All right. Mr. Liman or colleague, which of the -- I
13 guess it is 17 questions, although somewhere in the cover
14 letter to me it was described I think as 25 -- in any event,
15 which of these are you willing to answer and which are you not?

16 MR. REENTS: Your Honor, I would say we have answered,
17 in fact, most of these either explicitly or in sum and
18 substance.

19 THE COURT: Then, I guess the question is: Why can't
20 you do a cut and paste and take their questions and the answers
21 you have already given them and be done with it rather than
22 asking me to rule as to whether you have or haven't or whether
23 they should have all of this or shouldn't, but you're telling
24 me they did --

25 MR. REENTS: Your Honor, we made an effort to try to

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1 narrow the issue with them at our meet-and-confer. They
2 weren't interested in going question-by-question. They wanted
3 to present it all-or-nothing to you. We were sort of forced
4 into this position. Nevertheless, we could do that copy-and
5 paste job. They have the letters. A lot of these questions
6 were answered on the record. That said, there are certainly
7 questions here that we don't feel are appropriate and are not
8 willing to answer.

9 THE COURT: Let's go with the "I will assume you will
10 answer all 17 except for the ones you tell me now that you
11 don't want to answer," then I will rule on them.

12 MR. REENTS: Okay. So just going through these --

13 THE COURT: Both to save your money on the transcript
14 and to save my patience, think without talking out loud, and
15 just say question number X is a problem. Don't tell me 1 is
16 good, 2 is good. Get to the ones you don't like.

17 MR. REENTS: Okay. Question 9, they have asked for
18 the identity of every one of the eight custodians most
19 frequently --

20 THE COURT: I agree, the objection is sustained.

21 What else?

22 MR. REENTS: Question 10, we --

23 THE COURT: Is there an org chart that would give them
24 this information?

25 MR. REENTS: There is not an org chart that we have

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1 been able to locate. We did ask this question of the eight
2 custodians we were able to reach, and we were able to confirm
3 whether any of those supervisors or direct reports had any
4 involvement in the relevant event here, and the answer
5 overlapped with the custodian we had already identified.

6 THE COURT: Put that answer in your answer 10, and
7 that will suffice.

8 What else?

9 MR. REENTS: Question 11. Again, we have conducted
10 this diligence. We talked to the secretaries that we could
11 identify. We don't think that it is necessary to actually list
12 them out and provide effectively an interrogatory response on
13 who their secretaries are.

14 THE COURT: Subject to hearing anything from
15 plaintiff's counsel, 11 is out.

16 12 is out because it is similar to 9.

17 What else?

18 MR. REENTS: 14. There are over 100 individuals
19 listed --

20 THE COURT: 14 is out.

21 What else?

22 MR. REENTS: 15.

23 THE COURT: 15 is out.

24 What else?

25 MR. REENTS: 16 we have already answered on the

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1 record, your Honor, at the last conference.

2 THE COURT: So then you will just paste it in.

3 Is that it?

4 MR. REENTS: Just a moment. Let me confer.

5 And 17.

6 THE COURT: That doesn't seem problematic. Either
7 there is a date you learned of it or you didn't learn of it.
8 To the best of your client's ability to answer that. So that
9 is still in.

10 Okay.

11 MR. LYLE: Your Honor, if I may be heard?

12 THE COURT: Yes.

13 MR. LYLE: On the questions that we addressed in 9,
14 12, what we're trying to achieve is to figure out how best to
15 gather the information that Vale has, that they would have had,
16 had they not destroyed the documents. That's what we're trying
17 to achieve with those.

18 THE COURT: It appears that so are they, but this is
19 not a very good way to get it. Either you trust that they
20 have, indeed, done what they say they have, which is gone to
21 others in the company who might have had communications or
22 whatever. This seems a lot more like discovery about discovery
23 and/or make-work.

24 MR. LYTTLE: With respect to paragraph 14, question
25 number 14, that's the custodians they have identified in

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1 response to the interrogatory referred to in that question.

2 Other custodians, they're quite right, there are about a
3 hundred of them, but they don't give us any sense of what it is
4 that their information is. What we would propose is, with
5 respect to that one, if we could have them take us through so
6 that we can approximate and try to determine if, of that pool,
7 there are custodians that we should substitute in response.

8 THE COURT: How many people are on your 26(a) list?

9 MR. LYLE: On our 26(a) list?

10 THE COURT: Do you really want to do that for every
11 one on your list, as well?

12 MR. LYLE: Your Honor, we don't have any witnesses
13 whose documents are missing.

14 THE COURT: It is going to come up for other
15 deposition issues and the like. If one side has to do that,
16 what is the role, and it is not likely to be particularly
17 useful --

18 MR. LYLE: Understood.

19 THE COURT: -- I'm not inclined to go there, and if I
20 were convinced, I would probably be convinced to do it equally.

21 MR. LYLE: Point taken, your Honor.

22 Perhaps, then, what we could do is have them go
23 through and tell us, of that pool, who would be the people who
24 would be the closest, so that we can at least, when we start
25 getting documents from them, look at those particular

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1 individuals with that eye.

2 THE COURT: Mr. Reents.

3 MR. REENTS: We have effectively done that. We have
4 gone back and talked to, we've reached out to the eight
5 custodians, those that we could reach out. I asked them who
6 they were communicating with about these issues, who else would
7 have been involved. We have done that investigation, but
8 people that they identified are a subset of the people
9 identified in the interrogatories --

10 THE COURT: Is there anyone they identified who is not
11 already one of the custodians whose material is being searched?

12 MR. REENTS: Yes, there is one individual which we
13 alerted them to by letter, a Mr. Ricardo Saad, who was one of
14 the custodians that they sought when we were negotiating over
15 custodians back in December and January. They agreed not to
16 seek that custodian, not because of any burden argument, but
17 because they agreed with us that his documents were not
18 relevant to the litigation because he wasn't involved in any of
19 the negotiations with BSGR and Rio Tinto. He was purely an
20 operations person.

21 THE COURT: All right. Mr. Lyle, Mr. Lyttle, whoever.

22 MR. LYLE: I'm being told that we agreed to that when
23 we thought we had the other eight custodians. If they give it
24 to us in writing, we will take whatever he is saying. We have
25 no idea --

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1 THE COURT: But what he is saying is the people who
2 are the likely contacts are the people whose files are being
3 searched with one exception. This is becoming discovery about
4 discovery. What is the gentleman's name? Saad?

5 MR. REENTS: Ricardo Saad.

6 THE COURT: Put him in the custodian search file. Add
7 him back in.

8 Next issue.

9 MR. LYLE: Your Honor, can we also ask, in 13, Mr.
10 Guto Quintella and Fabio Spina be added.

11 MR. REENTS: Your Honor, they're not suitable
12 replacements, but beyond that, Mr. Spina left Vale in 2011, and
13 Quintella left Vale in 2010. We haven't investigated whether
14 there may be documents. It's extremely unlikely.

15 THE COURT: Based on that representation, we will
16 leave them out for now. If the other production shows that
17 they had involvement and that any of the material still exists
18 at Vale, we can revisit the issue.

19 Okay, next. The arbitration issue where you two are
20 in agreement, and with BSGR, a little differently, it strikes
21 me that the solution here, although it will create a little
22 more work for Vale, is not to produce everything received from
23 BSGR in the arbitration but only such information as is
24 otherwise called for by the discovery requests or the Hague
25 convention requests in this case.

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1 Does that's work for BSGI?

2 MR. FILARDO: Good afternoon, your Honor. I don't
3 think it was clear in the papers -- and I certainly didn't make
4 it clear to your Honor the last time I was before you --
5 Redfern schedules and document requests haven't even been
6 issued in the LCIA and won't be issued until I would say the
7 end of July.

8 THE COURT: That wasn't my question.

9 MR. FILARDO: Understood, your Honor. We would have
10 had our production in response to the letters of request as
11 scheduled in the Court's scheduling order at the end of June,
12 and I think any documents that would have been relevant to this
13 matter and obviously requested would be produced by then. At
14 that point, if there was anything that was left out for any
15 reason, there could be additional requests made and
16 applications to your Honor.

17 THE COURT: On the one hand, that seems to make sense.
18 As I understand it, we are still waiting for my counterpart,
19 the senior master in London, to actually approve the letters of
20 request.

21 Has there been any change in that in the two days
22 since I got your letter?

23 MR. FILARDO: No, your Honor, there hasn't, but we
24 have been undertaking it. As we told your Honor before, we
25 have done a collection. We have continued that collection.

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1 And we are doing our review in preparation to be able to have a
2 production, a timely production.

3 THE COURT: Any reason this shouldn't be tabled in
4 that case until the production under the letters of request?

5 MR. FORST: Just so I'm clear, the way that would work
6 is they'll produce, in response to the Hague, Vale will
7 otherwise produce if there is anything going on in the
8 arbitration in the meantime to us, too.

9 THE COURT: Come on. Either pay attention --

10 MR. FORST: I'm doing my best. I'm trying --

11 THE COURT: It sounded an awful lot like trying to
12 reverse the order that Mr. Filardo was suggesting. What he is
13 saying is no, there is no need -- look, the only reason to have
14 the production out of the arbitration is in the event that for
15 some reason the letters of request in the U.K. were not honored
16 or to get the material a little faster here. It seems to me
17 that having heard from Mr. Filardo that they are indeed
18 assuming that the letters of request are going to be approved
19 in the U.K. because they agreed to them here and that they're
20 already reviewing their documents for production there, this
21 seems to me as an issue that the Court need not deal with.

22 MR. FORST: I understand that. Thank you for that
23 clarification.

24 The request also includes other positions of what's
25 been produced in the arbitration, which I understand we're

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1 tabling, witness statements, other submissions to the panel.

2 I'm not sure if that has happened or not yet.

3 MR. FILARDO: To the extent that there were pleadings
4 filed in the arbitration, there were. There was a demand
5 filed. There was a response to that demand. I'm not sure of
6 any of the specific pleadings. I'm not sure of the relevance
7 of those pleadings here in this action. Certainly, we found no
8 authority that would provide a basis to have a wholesale
9 evisceration of a confidentiality agreement at an arbitration
10 unless there was first an analysis of relevance.

11 THE COURT: Has BSGR produced any affidavits or
12 witness statements?

13 MR. FILARDO: Not yet, your Honor.

14 THE COURT: Inform Rio Tinto when you do, and I will
15 deal with the issue then. That doesn't mean I'll grant them
16 access to it, it doesn't mean I'll deny it. This isn't law
17 school. I don't have to deal with hypotheticals.

18 Next issue.

19 MR. FORST: Judge, just to be clear, that applies to
20 Vale, as well, in the arbitration. I don't think they have an
21 objection to that.

22 MR. LIMAN: Your Honor, with apologies, that wasn't
23 raised in the letter by Rio Tinto. Mr. Blackman was handling
24 that, and I'm not prepared to address it. We can get on the
25 phone with them.

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1 THE COURT: Okay. Talk about it. I assume that as
2 with BSGR, there are no statements yet.

3 MR. LIMAN: Your Honor, I apologize. I can't make a
4 representation.

5 THE COURT: Talk to Mr. Blackman, and we will go from
6 there.

7 Okay. I think we now go to the issues on discovery
8 from the defendants to Rio Tinto starting on page 13 in the
9 letter. Is there anything prior to page 13 that you were
10 seeking a ruling on that we haven't covered?

11 MR. LIMAN: No, your Honor, I think we have covered
12 that.

13 MR. LYTTLE: Your Honor, there is one thing on page 7,
14 which was news to us in this letter, on the look-back
15 diligence.

16 THE COURT: Yes.

17 MR. LYTTLE: Vale, for the first time in this letter,
18 has described in more detail their efforts on this look-back
19 diligence issue, and they have made a couple of representations
20 on this Piaui article. Quick context on that article. Your
21 Honor, that is an article that Vale general's counsel and the
22 certain CEO sat for and gave an interview for.

23 THE COURT: And the press, having listened to
24 interviews, have never gotten anything wrong, in your
25 experience?

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1 MR. LYTTLE: No. Fair point, your Honor. What we
2 have asked for, though, is they reference talking to a number
3 of people at their client, about this, as well as reviewing
4 board --

5 THE COURT: Is the CEO who sat for the interview on
6 the witness list?

7 MR. LYTTLE: No, your Honor.

8 THE COURT: On the deposition list, rather?

9 MR. LYTTLE: We would like to collect his documents
10 first and then consider whether the deposition is necessary.
11 What we are asking for is who did they talk to and any
12 non-privileged board materials they reviewed in connection with
13 this.

14 THE COURT: Who is the "they"? The counsel?

15 MR. LYTTLE: Correct. I don't think who they talked
16 to is privileged. And then we just asked to see any
17 non-privileged board materials that support these
18 representations.

19 THE COURT: Mr. Liman.

20 MR. LIMAN: Your Honor, it's our position that who we
21 talked to in the investigation we did is work product.

22 THE COURT: Okay. And on the board materials, are
23 there any non-privileged ones?

24 MR. LIMAN: Your Honor, if there are non-privileged
25 ones and if they're responsive, they will be produced. I

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1 haven't reviewed them.

2 THE COURT: They may be responsive only in the sense
3 of showing a negative, which isn't particularly helpful.

4 Is there anything you can give Mr. Lyttle to give him
5 a little more comfort other than you and your colleagues are
6 officers of the court?

7 MR. LIMAN: We are officers of the court, and they're
8 going to be taking depositions. We take the representations
9 seriously, your Honor.

10 THE COURT: Okay. At this point, develop information
11 either from the existing depositions that you're going to be
12 taking or give me something more than a newspaper article as
13 proof that there was something that went on.

14 MR. LYTTLE: Fair enough.

15 Do I hear correctly, though, that he will be producing
16 non-privileged board materials?

17 THE COURT: Only if they say something positive as
18 opposed to they looked at all the board minutes for two years
19 and that they don't give any indication that there ever was a
20 look-back. That would mean they are either going to give you
21 blank board minutes and redact everything, which doesn't help
22 anybody, or they're going to be giving you totally irrelevant
23 and possibly business-sensitive information merely to show that
24 there was no information at that board meeting about a
25 look-back.

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1 MR. LIMAN: The only thing I would say, if we are
2 getting into board minutes that go until the time of the
3 investigations and the lawsuit, we have also requested board
4 minutes from Rio Tinto, and we assume they'll be producing
5 those, as well.

6 MR. LYTTLE: Is that a yes --

7 THE COURT: That's a yes if you're producing yours.
8 It seems like this is one of those that what's sauce for the
9 goose is sauce for the gander.

10 MR. LYTTLE: We have produced and agreed to produce
11 relevant board materials. I don't think there will be any
12 debate about that.

13 MR. LIMAN: We will live by the same rules.

14 MR. LYTTLE: Including for this same time period --

15 MR. LIMAN: Your Honor, it's reciprocal.

16 THE COURT: Reciprocally.

17 MR. LYTTLE: Yes, thank you.

18 THE COURT: Very good.

19 Confidential source names. I'm doing this by starting
20 on page 16 since the defendant is moving. It seems to me we
21 have been over this ad nauseum, and you're asking them to
22 produce information that they don't have that they have tried
23 to get, so they at least have acted in good faith and been
24 told, apparently, to shove it by the investigators. Whatever
25 you may argue down the road as to the contractual right between

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1 Rio Tinto and its investigators, I don't see that there is
2 anything that I can order here.

3 MR. LIMAN: Your Honor, I respectfully disagree. I
4 guess what I would do is direct your Honor first -- not to our
5 argument -- but to their argument on page 13.

6 THE COURT: How about the sentence that says there is
7 nothing more Rio Tinto can do?

8 MR. LIMAN: I, actually, went below that, because I
9 think the sentence that is most telling is the sentence that
10 begins the following paragraph: "As much as Vale may wish it
11 otherwise, neither Rio Tinto nor the investigators (the actual
12 parties to the agreements) shares Vale's view that Rio Tinto
13 has the right to the names of the sources."

14 Your Honor, what I would do and the way I think about
15 it is to direct your Honor's attention to Judge Kaplan's
16 opinion in the Auction House Securities case, where he drew the
17 analogy between requests like this, which ask for the Court to
18 make a legal determination about what's in a party's control
19 and custody to they request the Court receives all the time it
20 has here with respect to blocking statutes. We're in the
21 position, frankly, if we don't get an order from your Honor
22 with respect to this one way or the other, there is not going
23 to be an order. Let me illustrate to you the reason why.

24 THE COURT: I think you're asking me to interpret the
25 contract Rio Tinto has with parties who are not here. Is that

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1 what you're asking me to do?

2 MR. LIMAN: It is exactly, and I tell you why --

3 THE COURT: I will cut you off unless you need to make
4 a record for objections before Judge Berman. I'm not doing
5 that.

6 MR. LIMAN: I think I might, your Honor, so if I could
7 be heard.

8 THE COURT: Go ahead.

9 MR. LIMAN: The approach that Judge Kaplan and other
10 courts have taken is to say that with respect to the objections
11 of third parties, that may go to the ultimate consequence of a
12 failure to produce. Your Honor, to preserve the integrity of
13 the rules of procedure, has the authority and in fact has the
14 responsibility to give us a ruling: Is this either within
15 their custody and control or is it not? And that, in this
16 circumstance, requires an interpretation --

17 THE COURT: Let me suggest this: On the assumption
18 that there has not been a wink and a nod when Rio Tinto asked
19 the investigators -- and you may have the right to
20 cross-examine them on this, to a certain extent, the same way
21 they are trying to cross-examine you folks on the eight
22 custodians and all that -- but they have represented to the
23 Court that they have asked the investigators for these sources,
24 and the investigators have said no. For me to rule, other than
25 setting up a spoliation issue or an international comity issue,

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1 for me to rule that the contract entitles them to this right
2 and, therefore, they have to tell the investigators that they
3 are asserting their rights under clause 16.1 or whichever other
4 clause it is and they are demanding the names of the sources,
5 which presumably the investigators are still going to say,
6 sorry, Charlie, you can't have it, what does that accomplish?

7 MR. LIMAN: First of all, the clause that they point
8 to is not a clause that contains a future representation that
9 they are not going to breach any agreements. What the clause
10 has is a representation, which is standard in these agreements,
11 that at the time of signing, the investigators have not
12 breached any laws or obligations.

13 Second, your Honor, just to illustrate the importance
14 of this request and the reason why we would ask for your Honor
15 to rule on the issue of control, just to take one of the
16 investigative reports as an example, the one from Executive
17 Research Associates, which is called Project --

18 THE COURT: Let me stop you. I'm not sealing the
19 transcript. I don't know if you people --

20 MR. LIMAN: I'm not going to go into anything that is
21 confidential except to say that the report contains a statement
22 from a confidential source that Vale did not have any
23 discussions with BSGR prior to December of 2008 --

24 MR. LYTTLE: With all due respect, we are going into
25 the substance --

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1 THE COURT: Mr. Liman, stay away from contents.

2 MR. LIMAN: That goes essentially to --

3 THE COURT: Let me step back a minute. When you
4 communicated with the investigators, was any of it done in
5 writing?

6 MR. LYTTLE: We provided a letter from one of the
7 investigators.

8 THE COURT: No, no. Your letter to the investigators
9 or your communication to the investigators, was it done --

10 MR. LYTTLE: With some of them and others --

11 THE COURT: Do you have any problem producing, for
12 those that are in writing, the letters or emails or whatever
13 form of paper or digital record there is?

14 MR. LYTTLE: Yeah, I think the vast majority would be
15 emails asking us to set up a call in which we discussed the
16 issues with them.

17 THE COURT: All right. Then, I am going to direct
18 you, for each of these investigators, to say that you are
19 directing, ordering, requesting, whatever word you think is
20 most appropriate under the contract, for them to reveal the
21 names of their sources to you, and that you want a written
22 response, and we will see where it goes from there.

23 MR. LYTTLE: Your Honor, I'm happy to do that with one
24 exception. I think that Rio Tinto does not believe that the
25 contract -- first of all, the contract, Mr. Liman, it only

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1 applies to two investigators. We do not believe that we have a
2 right under the contract to source names. We have asked them
3 if they're willing to voluntarily provide it. They have said
4 no.

5 THE COURT: I have no authority over the non-parties.
6 The question is your obligation under the Second Circuit's
7 possession, custody, or control practical ability test. It
8 seems to me that under that test, regardless of the contract,
9 that you or at least your client has or had a relationship with
10 these investigators that allows you to ask for this information
11 because it is being asked for in a lawsuit. And to do that
12 without any negative in there, whether that is a wink or a
13 legitimate "We don't think the contract entitles us to it, but
14 we want it anyway," I want a very clean letter sent out by the
15 appropriate relationship person at Rio Tinto or you saying you
16 are acting at the request of Rio Tinto, the former contracting
17 party, with the investigators, asking them to disclose the
18 confidential sources. You will then provide that and any
19 response to Mr. Liman. That will suffice for now. If
20 Mr. Liman makes another motion for me to interpret contracts or
21 whatever, I may or may not. If I do, I will give the
22 investigators, through you, notice that if they want to come in
23 and argue without subjecting themselves otherwise to the
24 Court's jurisdiction, they can, but it's not at least in terms
25 of the possession, custody, or control issue I will possibly be

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1 interpreting their contracts.

2 MR. LYTTLE: Just so I'm clear, your Honor, you would
3 like us to write a letter to the investigators asking them in
4 writing what we have already asked orally, which is whether
5 they are willing to turn over information regarding sources and
6 produce that letter and any responses --

7 THE COURT: And that it is Vale's position that they
8 are required to, without regard to what your position is or
9 isn't or what their position should be.

10 MR. LYTTLE: It is Vale's position that they're
11 required to --

12 THE COURT: Correct. And that you are required to
13 give it to Vale.

14 MR. LYTTLE: We are required to give the
15 information --

16 THE COURT: It is Vale's position that you have the
17 practical ability to get this information from the
18 investigators and to produce it in this lawsuit, and if you
19 don't, there will be repercussions.

20 MR. LYTTLE: I don't mean to be obtuse. What would be
21 the repercussions?

22 THE COURT: If the Court were to find down the road on
23 a full-blown motion that Rio Tinto had the practical ability to
24 get this information and did not get it, there could be some
25 sort of spoliation repercussion with respect to it. That's

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1 three steps down the road. Right now, in an effort to avoid
2 interpreting a contract with one of the parties absent, I think
3 that the more forceful request in writing should suffice for
4 now. If it doesn't, it doesn't.

5 Okay. We're moving on. With respect to the document
6 production issues at page 18, and I'm quite sure other than
7 when we get to Chinalco, on page 19, what is it that you want
8 from me?

9 MR. LIMAN: Your Honor, all we want, which I take it
10 is not disputed, is an order that both sides are to be
11 complete -- not substantially complete -- but be complete with
12 respect to their documentation production by June 30th.

13 THE COURT: That's what Judge Berman said.

14 MR. LYTTLE: Your Honor, with all due respect, that's
15 not what Judge Berman said. It is substantially complete, and
16 we are very much on track, as Vale has represented, that it is,
17 as well. Substantially complete was built in and heavily
18 negotiated and entered by this Court. A full document
19 completion has never been contemplated by June 30th.

20 THE COURT: When is it contemplated by? Because,
21 otherwise, you can't take depositions --

22 MR. LYTTLE: We built this date in exactly for that
23 reason, so you weren't dumping large numbers of documents.
24 They just served requests on us --

25 THE COURT: New requests is a different story. The

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1 stuff that has been on the table since day one, where in the
2 normal case it would have been 30 days, obviously it is well
3 beyond that for good reasons and for reasons that may or may
4 not be as good. The issue is, again, parity on both sides,
5 so --

6 MR. LYTTLE: Your Honor --

7 THE COURT: Let's put it this way: You know you've
8 got a November 30th -- I don't have my file in front of me --
9 cut-off, and you all have lots and lots of depositions you're
10 going to want to take. The parties also have to be able to not
11 only see the documents but analyze them. If substantially
12 complete means 99 percent, that's one thing. If substantially
13 complete means we're still going to be producing documents
14 other than your requests in July, August, September, we have a
15 problem. And you're all going to have that problem because I
16 don't think Judge Berman, who has the ultimate control over
17 that November date, is going to give you any more time.

18 MR. LYTTLE: We absolutely are working towards, and we
19 hope Vale is doing the same, an absolute God faith substantial
20 completion.

21 THE COURT: What does substantial mean?

22 MR. LYTTLE: I am happy to discuss metrics around that
23 with Mr. Liman. We tried to discuss that initially and Vale
24 did not want to put a number on it. We initially said 80
25 percent. We can go higher than that. That's fine, too. But

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1 it was Vale's demand --

2 THE COURT: 95 percent, and we're moving on. That's
3 the Court's order.

4 Chinalco, you'll go talk about in the back.

5 MR. LIMAN: Your Honor, with respect to the remaining
6 5 percent --

7 THE COURT: Let's see where we are. Unfortunately, I
8 will be seeing you several times before June 30th.

9 Okay. Chinalco, you're going to try to work through
10 that.

11 The BHP documents, it sounds like the solution
12 implicitly suggested by both sides is that as Rio Tinto sees
13 BHP-related documents in going through the TAR process, it will
14 mark them as nonresponsive but produce the ones it sees. That,
15 I take it, is what you're suggesting --

16 MR. LYTTLE: That is our suggestion, your Honor.

17 THE COURT: Why doesn't that work?

18 MR. REENTS: The reason that doesn't work, your Honor,
19 is because if you look back at what they have produced to us
20 from the BHP production, you remember that there were five
21 custodians that your Honor allowed --

22 THE COURT: The problem is -- and I think they're
23 right -- you wanted that done faster, quicker, up front, and
24 they did it.

25 MR. REENTS: Right.

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1 THE COURT: So it probably will confuse the predictive
2 coding system to start marking that as relevant when it has
3 nothing to do with everything else that's going on. You can't
4 have it both ways.

5 MR. REENTS: They haven't made that representation,
6 and I'm not sure that that is true. The documents came --

7 THE COURT: Whether it confuses the system or not, I
8 guess my question is: Having asked for it to be done in a
9 certain way up front, why do you get another crack at it now?

10 MR. REENTS: It is not necessarily getting another
11 crack at it, your Honor. They're coming across these documents
12 in the ordinary course of the training exercise. The
13 incremental burden of marking documents that they have agreed
14 are relevant, that they have agreed to produce as relevant
15 during the training process, doesn't seem to us to be an
16 extraordinary approach --

17 THE COURT: The burden is what it does to the
18 predictive coding software, and you each have to give me your
19 expert's opinions on that, so I'm not just guesstimating from
20 prior experience.

21 MR. REENTS: Your Honor, one fact to consider --

22 THE COURT: Another fact to consider is that it is
23 3:00 and I have another case scheduled to be here, and since I
24 saw a few more people come in recently, I suspect they're here.
25 So wrap it up.

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1 MR. REENTS: The two custodians that they suggested of
2 the five turned out to have 4 percent of the documents. Your
3 Honor explicitly left open the possibility that if that
4 occurred, we would be entitled to come back and ask for more
5 discovery. That is what has happened. Now we have a
6 predictive coding process --

7 THE COURT: What do you mean they have 4 percent of
8 the documents?

9 MR. REENTS: Of the production that they have made,
10 your Honor, the BHP documents, there are five custodians.
11 Three of them were our suggestion, two of them were theirs.
12 The two that they had suggested and said that these were core
13 members of the BHP accounted for 4 percent of the documents
14 that they produced.

15 MR. LYTTLE: Your Honor, that is because of deduping
16 and other things. We produced over 60,000 documents on BHP
17 alone, and this came in on a very thin reed of relevance, to
18 begin with.

19 THE COURT: As of now, if you find BHP documents,
20 produce them. If either of you want to, before the next
21 conference, submit an affidavit or whatever from your ESI
22 experts, I will reconsider, but at the moment, I'm going with
23 Rio Tinto's proposal.

24 Any other issues?

25 MR. LIMAN: Two very short things.

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1 First, with respect to the letters rogatory, we were
2 informed today by the South African authorities that they were
3 not accepting the letters rogatory that were transmitted
4 through the regular South African process and wanted us to
5 follow a different process. We have another copy of the
6 letters rogatory that your Honor signed, and we would ask if we
7 could hand that up and to have your Honor re-sign it, just to
8 speed up the process.

9 THE COURT: It is exactly the same as before?

10 MR. LIMAN: Exactly the same as before.

11 THE COURT: Hand it up.

12 MR. LIMAN: In terms of process, we have agreed with
13 Rio Tinto, subject to your Honor's agreement that in future
14 letters, we'll try to organize things better.

15 THE COURT: That would be great, yes.

16 MR. LIMAN: We will alternate. The next letter the
17 defendants will go first with any issues they got and
18 plaintiff --

19 THE COURT: Since you brought this up, it would be
20 extraordinarily helpful if we had one party's position on a
21 small issue followed immediately by the opposing party's
22 position, and whoever is the movant should be first. Whoever
23 prepares the letter, I don't care, but if it is an issue where
24 Rio Tinto wants something from Vale, the Rio Tinto position
25 should be first, followed by the Vale position. If it is

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1 something that Vale wants first, then Rio Tinto is being
2 defensive in responding, then the order should be the Vale
3 position, followed by Rio Tinto. That would make things
4 helpful, in any event. Show, or make sure, that Mr. Lyttle is
5 comfortable with what you're asking me to sign. In the future,
6 isn't the easier method getting the clerk's office to do a
7 certified copy or whatever?

8 MR. LIMAN: If it is, we will do it.

9 THE COURT: In the meantime, hand it up so I can sign
10 it.

11 When do you all want to come back?

12 Should this come under today's date or a different
13 date?

14 MR. LIMAN: I suppose it should come under today's
15 date because that seems right to me. If we find out that it
16 should come under a different date, your Honor, may we submit a
17 new application to your Honor?

18 THE COURT: Yes. I have signed it. Send copies to
19 the other counsel.

20 MR. LIMAN: With respect to datum between two opposing
21 parties, one says four weeks, the other says three weeks, and
22 we can live with either three or four weeks on Vale's side.

23 THE COURT: Okay. Three weeks is May 28 or
24 thereabout. Other than Memorial Day, we're pretty open the
25 week of the 25th or the week of June 1st. What's your

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1 pleasure?

2 MR. FILARDO: As the Court sees fit.

3 THE COURT: Okay. Since you want afternoons,
4 June 1st, at 2:00.

5 MR. LIMAN: Your Honor, we do have an issue we're
6 discussing with the plaintiffs about the appropriate
7 representative from one of the investigative firms. My hope is
8 that we're going to be able to work it out with them. If we're
9 not able to, may we submit a letter to your Honor?

10 THE COURT: You know my rules. You know where to find
11 me.

12 Why don't you pick up what I have signed for you.

13 Okay. Usual drill. Make your arrangements with the
14 court reporter, and I will see you on June 1st.

15 ALL: Thank you, your Honor.

16 (Adjourned)